Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Petitioner*,

v.

GREYHOUND COMPUTER CORPORATION,
*Respondent*.

## CONDITIONAL MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 10, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Petitioner,*

v.

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*Respondent.*

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## CONDITIONAL MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF CERTIORARI

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Petitioner International Business Machines Corporation ("IBM") has this date filed a petition for a writ of certiorari under 28 U.S.C. § 1254(1) to the Court of Appeals for the Ninth Circuit seeking review of an order entered on February 1, 1980, denying IBM's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). In the event this Court considers that this case was not "in" the court of appeals within the meaning of Section 1254(1), IBM respectfully hereby moves for leave to file the annexed petition for a writ of certiorari

under 28 U.S.C. § 1651(a) to review the above-referenced order of that court.

Respectfully submitted,

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No.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Petitioner,*

v.

GREYHOUND COMPUTER CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Business Machines Corporation ("IBM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS BELOW

The order of the court of appeals (App. A) is not reported. The memorandum, order and certification of the district court (App. B) are not reported.

### JURISDICTION

The order of the court of appeals, denying IBM's petition for permission to appeal pursuant to 28

U.S.C. § 1292(b) on the ground that the issue of law raised by the petition had been resolved by the Ninth Circuit in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979), was entered on February 1, 1980. This Court has jurisdiction to issue the prayed-for writ under 28 U.S.C. § 1254(1)[1] or 28 U.S.C. § 1651(a).

In this petition, IBM invokes the jurisdiction of this Court pursuant to Section 1651(a), in the event that the Court considers that the case was not "in" the court of appeals within the meaning of Section 1254(1). *House v. Mayo*, 324 U.S. 42 (1945); *In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936); 9 *Moore's Federal Practice* ¶ 110.27, at 299 (2d ed. 1975); Rule 30 of the Rules of the Supreme Court of the United States. Should the Court further be of the view that the writ of certiorari ought properly to be directed to the District Court for the District of Arizona, IBM hereby requests that the Court treat this petition as a prayer to direct a writ of certiorari to that court.

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[1] IBM has today filed a petition for a writ of certiorari which invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). IBM submits that the fact that the court of appeals has considered the merits of the question presented in denying IBM's petition to appeal has "brought the case within any reasonable purpose of the requirement [of Section 1254(1)] that it be *in* the court." C. Wright & A. Miller, *Federal Practice and Procedure* § 4036, at 13 (1978) (emphasis added). This Court has, therefore, jurisdiction under Section 1254(1) to issue a writ of certiorari to the court of appeals. *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972).



## QUESTION PRESENTED

Whether a federal district court has the authority under the Constitution to strike a jury demand in a case of such complexity that the court cannot reasonably expect a jury to comprehend the evidence and the law.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

IBM hereby incorporates the "Statutory and Constitutional Provisions Involved" as set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

## STATEMENT

IBM hereby incorporates the "Statement" set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

## REASONS FOR GRANTING THE WRIT

IBM hereby incorporates the statement of "Reasons for Granting the Writ" set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

## CONCLUSION

This case raises an issue of unusual importance for the administration of justice in the federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 1980



## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-8301

D.C. No. Civ. 72-242 WPC Arizona (Phoenix)

GREYHOUND COMPUTER CORPORATION,
*Plaintiff/Respondent,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Defendant/Petitioner.*

## ORDER

Before: HUG and PREGERSON, Circuit Judges

Upon due consideration, the court issues the following order:

(a) Pillsbury, Madison & Sutro's motion for leave to file an amicus curiae brief is granted;

(b) respondent's motion for reassignment of panel is denied; and

(c) the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation*, slip op. at 1186 (9th Cir. December 10, 1979).

Filed Feb. 1, 1980
RICHARD H. DEANE
Clerk,
U.S. Court of Appeals

**APPENDIX B**

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
*Plaintiff,*

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Defendant.*

MEMORANDUM AND ORDER AND
CERTIFICATE

This complex case is set February 5, 1980 [now May 1, 1980] for retrial which the Court estimates will take a minimum of three months and probably more like four if tried to a jury as demanded by plaintiff. Defendant has moved to strike the jury demand so that the case may be tried to the Court. Plaintiff opposes.

This is an antitrust case involving sophisticated, highly technical and difficult questions of economics, technology and law. It is a complex case by any definition. Trial to the Court would substantially shorten the trial and avoid the very real danger of a hung jury and a third trial or more.

While the Court believes the current status of the law requires this Court to deny the motion to strike



the jury, this view is not unanimous. *See Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,753 (E.D. Pa. June 6, 1979), and ¶ 62,893 (E.D. Pa. August 21, 1979). The Court is informed that the question is currently before the Ninth Circuit. *See In re U.S. Financial Securities Litigation* M.D.L. No. 161 (9th Cir. petition for review granted August 29, 1977), *appealing* 76 F.R.D. 702 (S.D. Cal. 1977).

IT IS ORDERED:

The motion to strike the jury demand is denied for lack of authority to grant said motion.

CERTIFICATE

Pursuant to 28 U.S.C. § 1292(b), this Court certifies that the question as to whether this Court has the authority to strike the jury demand in a case such as this involves a controlling question of law as to which there is substantial ground for difference of opinion with respect to that question and immediate appeal may materially advance the ultimate termination of the litigation. *See* Judge Becker's opinion in *Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,893 (E.D. Pa.), dated August 21, 1979.

DATED November 6, 1979.

/s/ Wm. P. Copple
United States District Judge

Supreme Court, U. S.
FILED
MAR 28 1980
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1397**

INTERNATIONAL BUSINESS MACHINES CORPORATION,

*Petitioner,*

*vs.*

GREYHOUND COMPUTER CORPORATION,

*Respondent.*

## BRIEF IN OPPOSITION TO CONDITIONAL MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR WRIT OF CERTIORARI, UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-1397**

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INTERNATIONAL BUSINESS MACHINES CORPORATION,

*Petitioner,*

*vs.*

GREYHOUND COMPUTER CORPORATION,

*Respondent.*

---

## BRIEF IN OPPOSITION TO CONDITIONAL MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR WRIT OF CERTIORARI, UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT.

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### QUESTIONS PRESENTED

1. Greyhound hereby incorporates the Questions Presented in its brief in opposition to the petition for writ of certiorari in Docket No. 79-1396.

In addition, Greyhound states the petition of IBM in this docket number raises two additional questions, *viz.*:

2. Would an order under the "all writs" statute (28 U. S. C. § 1651(a)) result in a record from the Court of Appeals under which this Court can determine all questions presented by IBM's petition for a writ of certiorari?

3. Can this Court direct a writ of certiorari to the District Court for the District of Arizona when more than ninety days have elapsed since the entry of that court's order, and when there is a statutory permissive appeal for the review of certified interlocutory orders to the Court of Appeals which IBM has invoked?

## STATEMENT

In addition to the statement made by Greyhound in Docket No. 79-1396, Greyhound makes the following additional statement.

IBM obviously is uncertain how to proceed to seek review of the order of the Court of Appeals of the ninth circuit under U. S. C. § 1292(b) denying permission to appeal because it has also filed under a "conditional motion for leave to file a writ of certiorari under 28 U. S. C. § 1651(a)." IBM's uncertainty apparently stems from the fact, so far as we can determine, this Court has never granted certiorari from an order of a court of appeals where that court has denied permission to appeal under 28 U. S. C. § 1292(b). The reason for this is stated in Wright & Miller, *Federal Practice and Procedure* (1978 ed.) § 4036, p. 13, footnote 18:

> "At the other extreme, the discretion to deny interlocutory appeal under 28 U. S. C. A. § 1292(b), described in vol. 16, §§ 3929-3931, is so broad that Supreme Court reversal should never be available; nonetheless, there is no apparent advantage in forcing hopeless petitions outside of statutory certiorari into common law certiorari on the ground that the application for leave to appeal did not bring the case into the court of appeals."

## REASONS FOR DENYING THE WRIT

Greyhound hereby incorporates its statement of "Reasons for Denying the Writ" set forth in its brief in opposition to petition for writ of certiorari pursuant to § 1254(1) in Docket No. 79-1396 and adds the following.



1.

**The Writ Should Be Denied Under 28 U. S. C. § 1651(a) Because This Court Cannot Determine from the Court of Appeals Record Whether This Case Is in Fact "of Such Extraordinary Complexity as to Exceed the Practical Abilities and Limitations of a Jury."**

IBM's "Conditional Motion" and petition has been filed because Counsel are not certain whether this case was "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254(1). (Pet. 1) But whether the case was "in" or not and whether, since permission to appeal is discretionary, abuse of discretion must be shown before this Court should grant certiorari, a writ directed under another statute will not result in any different record being certified by the Court of Appeals.

As noted in our brief in opposition in 79-1396, the Court of Appeals record will consist merely of the District Court's order, IBM's petition, Greyhound's answer, and the Court of Appeals order. From this limited record, it will be impossible for this Court to determine whether this case is in fact too complicated for a jury to comprehend.

2.

**A Writ of Certiorari Cannot be Directed to the District Court of Arizona Because Timely Application Has Not Been Made Under 28 U. S. C. § 1651(a) and Because the Writ Is Not Available Where the Remedy of Permissive Appeal Has Been Provided Which Was Available of by IBM.**

Alternatively, IBM states that should this Court be of a view that the writ of certiorari properly be directed to the District Court for the District of Arizona, IBM prays that the Court treat this petition as a prayer for a writ of certiorari to that court. (p. 4) This cannot be done for the following reasons.

The District Court's Order was entered November 6, 1979. (App. B) The petition in this docket number was filed March

10, 1980. Under 28 U. S. C. § 2101(c), a writ of certiorari shall be "applied for within ninety days after the entry of such judgment or decree." More than ninety days has elapsed since the entry of the District Court's Order.

Although a common law writ of certiorari under 28 U. S. C. § 1651 has been used to bring before this Court's review, in exceptional circumstances, otherwise nonappealable orders (*United States Alkali Assoc.* v. *United States,* 325 U. S. 196; *DeBeers Ltd.* v. *United States,* 325 U. S. 202; *Far East Conf.* v. *United States,* 342 U. S. 570), writs under this section "are drastic and extraordinary remedies" reserved "for really extraordinary causes" in which an "appeal is a clearly inadequate remedy" and where there has been a clear abuse of discretion or usurpation of judicial power (*Ex Parte Fahey,* 332 U. S. 258, 260; *Will* v. *United States,* 389 U. S. 90, 106, 107; *Bankers Life Co.* v. *Holland,* 346 U. S. 379, 383.

Here there was an adequate remedy by permissive interlocutory appeal under 28 U. S. C. § 1292(b). IBM sought that remedy, the District Court granted a certificate, but permission to appeal was denied. IBM cannot, under the circumstances invoke the "all writs" statute.



## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit under 28 U. S. C. § 1651, or alternatively, to the District Court for the District of Arizona, should be denied.

Respectfully submitted,

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